



# Oregon

John A. Kitzhaber, M.D., Governor

**Department of Land Conservation and Development**

635 Capitol St. NE, Suite 150

Salem, Oregon 97301-2540

Phone (503) 373-0050

Director's Fax (503) 378-5518

Main Fax (503) 378-6033

Rural/Coastal Fax (503) 378-5518

TGM/Urban Fax (503) 378-2687

Web Address: <http://www.lcd.state.or.us>

Oct. 3, 2002

Mr. David Kaiser, Federal Consistency Coordinator  
Office of Ocean and Coastal Resource Management  
NOAA  
1305 East-West Highway, 11<sup>th</sup> Floor  
Silver Spring, MD 20910



Attention: Federal Consistency Energy Review Comments  
Advanced Notice of Proposed Rulemaking (ANPR)

The **Oregon Ocean and Coastal Management Program** has reviewed the ANPR issued by the Office of Ocean and Coastal Resource Management (OCRM) (Federal Register Vol. 67, No. 127, July 2, 2002 and Vol. 67, No. 154, August 9, 2002.) The ANPR relates to federal consistency procedures under the federal Coastal Zone Management Act (CZMA). OCRM is "evaluating whether limited and specific procedural changes or guidance to the existing federal consistency regulations are needed to improve efficiencies in the Federal consistency procedures and Secretarial appeals process, particularly for energy development on the Outer Continental Shelf (OCS)."

As part of its evaluation, OCRM specifically requested comments on six questions. Oregon's comments on the ANPR include discussion of those questions and are largely based upon consideration of those questions. But we begin with our overall position and observations on the need for further rulemaking or other action by OCRM.

**OREGON OBJECTS TO THE IDEA OF REVISING 15 CFR PART 930 FOR THE FOLLOWING REASONS:**

- **We see no evidence, either in our day-to-day operations or presented by OCRM as part of the ANPR, of any problems that warrant federal rulemaking action.** The ANPR explains that rulemaking is being contemplated based upon recommendations from the May 2001 "Energy Report" prepared by the National Energy Policy Development Group. That report, however, is not specific with respect to problems with the federal consistency process or regulatory changes or guidance that could address any such purported problems. In fact, that report merely states that potentially there could be problems associated with implementation of the CZMA and not that there actually are problems.
- **At the same time, we strongly believe that by proposing rulemaking solutions to purported but unsubstantiated "problems" there is a great likelihood that real problems will be created.** The types of changes contemplated in the ANPR have implications for all coastal states, all types of state reviews, and the state-federal relationship established under the CZMA. We believe that spillover or unintended effects of rule changes cannot be easily avoided.

Mr. David Kaiser, OCRM

ANPR – Federal Consistency

October 3, 2002

- The potential scope of the “limited and specific procedural changes or guidance” that might be deemed necessary by OCRM is very unclear. This lack of specificity, when considered along with the questions posed in the ANPR and the rule sections that could ultimately be affected, suggests that **any rules or guidance ultimately proposed will not be specific to OCS energy development nor targeted to fix well defined, documented problems.**
- **To initiate changes to regulations that have existed for only about one and a half years but which were substantially revised to carefully address twenty years of implementation experience does not make sense.** It makes even less sense to initiate regulatory changes based on the vague language in the May 2001 “Energy Report” prepared by the National Energy Policy Development Group, particularly considering that the Report was issued less than one year after 15 CFR Part 930 was substantially revised. Coastal states and federal agencies must be given a change to work with the new regulations. Having to chase a moving target would only increase the potential for implementation problems.

**The current rules took shape after extensive consultation and negotiation with federal agencies, coastal states, and other interested parties, and rulemaking threatens to upset the balance achieved.** The federal regulations, as revised and adopted in late 2000, contain numerous provisions that increase flexibility for how coastal states can work with federal agencies, set clear timelines and other limits for state reviews, and clarify requirements for federal permit/license applicants. OCRM worked very hard to craft regulations that balanced the interests of federal agencies, coastal states, applicants, and other interested parties. That work should not be so quickly cast aside.

If anything, we suggest that federal and state efforts to educate federal agencies and applicants about the CZMA and federal consistency requirements would best address the types of issues discussed in the ANPR. We are not convinced that there is a great need for new, OCRM-generated guidance on the topics addressed in the ANPR but would be more amenable to guidance than regulatory revisions.

The following comments on OCRM’s six questions further support our overall position on the ANPR.

**OCRM Question (1) focuses on defining “necessary information” for CZMA purposes including:**

**(a) the “need to further describe the scope and nature of information necessary” for state and Secretarial reviews**

OCRM’s question is written broadly and can be read as potentially applying to 15 CFR Part 930 Subparts C, D, E, and F. Therefore, our response is also broadly construed and not limited to OCS leasing or development.

The information necessary for a state review must be based upon the enforceable policies of the state coastal management program and the type of project proposed. Each state will

Mr. David Kaiser, OCRM

ANPR – Federal Consistency

October 3, 2002

have somewhat different information needs based on the enforceable policies of its program. And a state must have the flexibility to require information commensurate with the possible coastal zone impacts of a project. A "one-size-fits-all" approach will not work. Such an approach would be detrimental to coastal states, federal agencies, and applicants on both ends – setting the bar too low for large, complex projects and too high for small, minor projects. Also, a "one-size-fits-all" approach might miss altogether an information need important to any given coastal state. Using an Oregon example, we generally ask for information on local land use compatibility, but other coastal states may not have a local land use element to their coastal programs. (This is a very general example, not intended to imply that some information needs of coastal states won't be much more specific than this.)

OCRM has addressed the basics in the current regulations, e.g. need for a project description, analysis against enforceable policies, etc. We argue that OCRM is not in a position to make a blanket determination about the information necessary for any given coastal state to review a consistency determination or consistency certification for any and all projects. That sort of regulatory change would diminish the state role in coastal management decision making, upsetting the balance of federal-state roles carefully crafted in the CZMA.

If OCRM wants to further address the scope and nature of information necessary for state reviews, then the agency should encourage coastal states to better define information needs based upon enforceable policies. OCRM might also look at financial incentives or technical assistance to support such state efforts. This approach, that of having the coastal states address what information is necessary pursuant to their federally-approved programs but with some OCRM oversight, is the most likely to result in an adequate, definitive explanation of necessary information. In Oregon's experience, federal agencies and applicants generally want some certainty about what information needs to be submitted and are not necessarily trying to avoid providing information to a coastal state. Quite frankly, anything that OCRM could come up with in federal regulations would have to be generic enough to fit all coastal programs and a wide range of possible project types and thus would not provide additional certainty to federal agencies and applicants.

In the past, OCRM has expressed some concern about federal agencies having to go to state coastal programs to determine "necessary information" or other requirements versus just turning to the federal regulations. Yet, most federal agencies work on projects at a regional or state level and therefore at best have to understand one or two coastal programs. Coastal states rarely are dealing with the D.C. headquarters offices of federal agencies. And in reality, a federal agency needs to consult the applicable state coastal program both in determining if an action is likely to affect the coastal zone and in evaluating compliance with the enforceable policies of coastal programs. A federal agency has to understand the specifics of coastal programs to prepare consistency determinations or other coastal zone determinations.

Nothing in the CZMA appears to preclude a coastal state from setting information requirements for federal permit and license reviews (Subparts D & E). The federal regulations therefore must not be altered to restrict such action by a coastal state. We are also not convinced that the CZMA precludes a coastal state from setting necessary information requirements for federal agency activities (Subpart C). Instead, coastal states

Mr. David Kaiser, OCRM

ANPR – Federal Consistency

October 3, 2002

appear to have some obligation to explain what their enforceable policies are and how compliance can be demonstrated.

*Note: Due to a lack of experience with the Secretarial appeals process, Oregon defers to other coastal states and the Coastal States Organization regarding that portion of OCRM's question.*

(b) the best way to inform federal agencies and the industry of information requirements

We fundamentally do not understand what is wrong with federal agencies and industry representatives contacting state coastal programs to inquire about state information requirements! After all, we are operating under a section of the CZMA entitled "coordination and cooperation" – i.e., there needs to be communication between these parties and coastal states. OCRM should continue its advocacy for early communication and consultation between federal agencies, applicants, and coastal states.

Please also note that the OCRM web page has links to all the web pages of the state coastal management programs. This means that any federal agency or industry employee can go to this one web site and link to the coastal program(s) that they need more information about. They can also find state-level contacts this way.

OCRМ could conduct trainings for federal agencies and industry but then must do so at the individual state level and on a regular basis. For example, holding a training in California or Washington is not of much use to Oregon because federal staff and other interested parties working in Oregon generally cannot attend given travel and time restrictions. And OCRM training of federal agency staff at the D.C. headquarters level has limited benefits for coastal states and few benefits for the federal agency staff at the regional or state-level needing to interact with coastal states. Better yet, OCRM could support via funding and technical assistance training held by coastal states for federal agencies and permit applicants. OCRM might also look at additional, targeted funding for updating of state publications or other outreach efforts that address enforceable policies and information requirements.

OCRМ Question (2) focuses on the Secretarial appeals process. (a) the need for a definitive date by which the Secretary must issue a decision in a consistency appeal and (b) which, if any, environmental review documents should be included in the administrative record

*Note: Due to a lack of experience with the Secretarial appeals process, Oregon defers to other coastal states and the Coastal States Organization regarding this question. However, we do wonder why the federal Administrative Procedures Act is not sufficient to address this procedural question. We also must express our objection to any proposal that might result in harm to a state's position in the event that the Secretary fails to meet specified deadlines through no fault of the state.*

OCRМ Question (3) focuses on more effective coordination of CZMA, OCSLA, & NEPA within the statutory timeframes of the CZMA and OCSLA

*Note: Oregon has not been faced with OCSLA implementation off its coast and thus is not offering comments specific to CZMA-OCSLA coordination. On that matter, we defer to coastal states with direct OCS experience and to the Coastal States Organization. However,*

Mr. David Kaiser, OCRM

ANPR – Federal Consistency

October 3, 2002

*Oregon can speak to coordination of CZMA and federal review documents, notably NEPA documents. We believe that our experience with NEPA and CZMA coordination is applicable to some extent to the question posed by OCRM.*

As the federal consistency regulations explain, CZMA and NEPA obligations are separate and distinct. But in reality, federal agencies tend to define, examine, and justify many of their proposed actions via the NEPA process and generally want to coordinate the NEPA and CZMA processes. Federal agencies routinely submit NEPA documents as supporting information. The current regulations make clear the distinction between NEPA and CZMA while allowing for coastal states and federal agencies to reach case-by-case agreements on how to best coordinate NEPA and CZMA. Since there is not a "one-size-fits-all" answer to the question of how to coordinate NEPA/CZMA, we believe that the current regulations are appropriate and would object to any proposal that reduces flexibility to solve case-specific issues.

Oregon has tried various approaches to NEPA and CZMA coordination. We have at times found that draft environmental assessments (EA) for relatively small projects contain sufficient information for coastal zone review and that such projects are not likely to change between issuance of the draft and final EAs. On the contrary, projects as described in draft environmental impact statements (EIS) often are changed substantially in response to public comment or developing information. In those situations, conducting a coastal zone review at the draft stage is likely to just waste time; the changes to the project will often be significant enough to trigger another coastal zone review at the final EIS stage. Another situation we've had to face is that of a federal agency deciding that an action is categorically exempt from NEPA (a "CatEx") and not realizing that the action could still be subject to coastal zone review.

Oregon, like other coastal states, routinely provides guidance to federal agencies and applicants about how NEPA and CZMA can be coordinated. But ultimately the federal agency preparing the NEPA document makes internal decisions about how to address NEPA that a state cannot control. For example, we've informed federal agencies about how they can include a consistency determination and supporting information in a NEPA document and then received NEPA documents without the coastal zone information but with requests for coastal zone review. We are then forced to require the proper documentation separate from the NEPA document and cannot readily coordinate the coastal zone review schedule with the NEPA schedule. Other times we see federal agencies become disgruntled over the need to address CZMA requirements when they have failed to coordinate with the state early on, have not addressed CZM in the NEPA process, and they are late into the NEPA process. Again, our view is that education/outreach would be the most effective approach to addressing these sorts of coordination problems.

**OCRM Question (4) asks if there is a need for a "General Negative Determination" provision within Subpart C.**

Per federal regulation, a negative determination is submitted to a coastal state when the federal agency determines that there are no coastal effects associated with a proposed activity AND the type of activity is one identified on a state list as requiring review or one that has been reviewed by the state in the past. OCRM is asking if there is a need to expand the

Mr. David Kaiser, OCRM

ANPR – Federal Consistency

October 3, 2002

negative determination provisions to cover repetitive federal actions that collectively have no effect on the coastal zone.

Considering the types of federal activities Oregon has reviewed over the years, we cannot readily think of an example of a repetitive federal action that may fit under a "general negative determination." More importantly, we cannot think of an example that could be addressed via a "general negative determination" but not under the tools already available under federal regulations. A "general consistency determination" procedure is available for activities that will be repeated and individually have no or negligible impacts but cumulatively have an effect. Also in the 2000 rulemaking, OCRM added procedures to address federal actions with de minimus (i.e. have an effect but only a minimal effect) and environmentally beneficial impacts.

We do not anticipate that a provision for a "general negative determination" would be widely utilized. Yet there would be potential for such a provision to be abused by federal agencies. Specifically, our concern is that "general negative determinations" might be submitted in cases where a general consistency determination or de minimus determination is more appropriate. This could leave states having battles with federal agencies over whether or not repeated actions would have cumulative effects. Given the nature of cumulative impact questions, that just doesn't seem like a good area to generate battles. Also, there wouldn't be much recourse for coastal states if federal agencies use the general negative determination provision inappropriately.

**OCRM Question (5) asks if there is a need for guidance or regulatory action to address when offshore activities have "reasonably foreseeable coastal effects"**

We do not see a need for further guidance or regulatory action on this topic. We believe that the existing federal regulations provide sufficient guidance on this topic. The regulations explain the effects test for federal activities and the listed and unlisted permit procedures for applicants. If anything, there is a need for federal agencies and applicants to be educated about what these requirements mean.

Oregon has not been faced with any great debates or disagreements with federal agencies or applicants about the determination of potential coastal effects. On a few occasions, we have had federal agencies question state involvement in anything occurring outside the 3-mile territorial sea boundary. But clearly the CZMA provides for coastal states to address actions seaward of the 3-mile limit if those actions could have "reasonably foreseeable coastal effects" and particularly if the state has defined the offshore area as an area of geographic concern.

Oregon's ocean management program is a good example of a state defining a geographic area of interest offshore as well as defining effects of interest to the state. Oregon has identified an "ocean stewardship area" and has reviewed federal actions proposed outside of the three-mile territorial sea boundary but within the stewardship area when there has been a potential for coastal zone effects. To determine if an action could have "reasonably foreseeable coastal effects", we look to see if mobile coastal resources (e.g., fish, marine mammals), significant habitat areas (e.g. nursery grounds, refuges) or coastal zone uses (e.g., commercial and recreational fishing, navigation) might be impacted. We have also generated guidance that can be utilized by federal agencies and permit applicants about how

Mr. David Kaiser, OCRM

ANPR – Federal Consistency

October 3, 2002

coastal zone resources and uses can be inventoried and how the potential for coastal zone effects can be evaluated. Based on the effects standard, Oregon has reviewed a variety of actions located outside of the territorial sea boundary, e.g. dredged material disposal, fiber optic cables, vessel disposal, preliminary proposals for deep seabed mining, etc.

Oregon would have to object to any regulatory action that tried to create a "one-size-fits-all" approach to determination of reasonably foreseeable effects. Actions offshore can have highly variable impacts on coastal zones, and, fundamentally, federal agencies and state coastal programs need to look at the potential for impacts on a case-by-case basis. For example, some actions might cause concerns about impacts to a particular habitat area while others might cause concerns about impacts to a state's commercial fishing industry. Or looking at the real examples of vessel or dredged material disposal offshore, disposal at one location outside the 3 mile limit may have significant impacts on the fishing industry or significant marine habitat areas but the same action taken at a different geographic area outside the 3 mile limit may have only minor or no detectable coastal zone impacts.

**OCRM Question (6) is about whether multiple federal approvals needed for OCS activities should be consolidated into a single consistency review**

*Note: As stated previously, Oregon has not been faced with OCSLA implementation off its coast and thus is not offering comments specific to CZMA-OCSLA coordination. However, we offer the following comments on the generic question of consolidating multiple federal approvals in a single consistency review.*

Again, we must question whether there is a black and white answer to this question. As a general matter, we work with federal agencies and applicants to identify all federal actions required for any given proposal. We also work with those parties to consolidate as many of those approvals under one review such that we can issue a single, comprehensive decision. But there are times when a certain federal action just cannot be wrapped into a review or an applicant has valid reasons for not pursuing a certain federal action until a later time. In those cases, it is good to have the flexibility to work with federal agencies and applicants to reach an agreement on process most appropriate to the situation.

To our knowledge, nothing in the existing federal regulations precludes consolidation and the practice is encouraged. Therefore, we see no need for amendment of the federal regulations.

#### **CLOSING:**

In summary, we reiterate our objection to the idea of revising 15 CFR Part 930. There is simply no evidence of problems that would rise to the level of federal rulemaking action as a response. Rulemaking to address purported but unsubstantiated problems is likely to create unintended consequences and will have effects beyond state reviews of OCS or other energy projects. Furthermore, the existing regulations provide for both flexibility and certainty regarding the federal consistency review process. Coastal states and federal agencies must be given a chance to work with the new regulations, the development of which took into account twenty years of implementation experience and balanced federal, state, and other interests.

Mr. David Kaiser, OCRM

ANPR - Federal Consistency

October 3, 2002

The problems described in the ANPR, to the extent that they are documented and shown to be widespread, can be addressed without further rulemaking. Certainly OCRM, the coastal states, and interested parties can and should work cooperatively to address any such problems. Education/outreach efforts should be the first area of focus in such problem-solving efforts. Guidance documents from OCRM may be a part of such efforts.

If OCRM intends to proceed with rulemaking despite our objections, then we must insist that any rulemaking be preceded by very clear and compelling evidence of the exact problems that will be addressed. In addition, OCRM must be able to show how rulemaking would address those identified problems, how rulemaking will not erode state rights under the CZMA or otherwise unduly infringe upon state reviews of various types of federal actions, and how coastal zone management will be enhanced.

Thank you for the opportunity to comment.

Sincerely,



Nan Evans, Manager

Oregon Coastal Management Program

cc. Kerry Kehoe, Coastal States Organization

Louise Soliday, Governors Office